No. 221.
Brief of Conrad & Lyon for Pets.

Filed Dec. 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

BRIEF FOR PETITIONERS.

HOLMES CONRAD,
EDWARD C. LYON,
For Petitioners.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

BRIEF FOR PETITIONERS.

The "affidavits and exhibits in opposition to petitions and motions of Nancy C. Browning, Stuart Wood, and others" do not even tend to meet or overcome the allegations made in said motions and petitions.

The gravamen of the charges made in the motions and petitions is that Hatfield and Rutherford, the appellants here and defendants in the court below, did not authorize such appeal to be taken, and that the case is in this court without authority from them; that they did not authorize any one to appear as their attorney and represent them in

the lower court; that they did not even know of the institution or pendency of the suit against them.

In her affidavit (Record, pp. 55, 56) Mrs. Hatfield gives a conversation had between Mr. Stiles and herself in 1895, in relation to an ejectment suit, on an occasion when Mr. Stiles, with a Mr. H. K. Shumate, was at her house.

Now, we would reasonably expect to find in Mr. Stiles' affidavit an explicit, clear, and unambiguous denial or admission of such conversation, for the matters recited by Mrs. Hatfield very nearly concern him, but no such denial appears there. We do find (Stiles' affidavit, p. 5) an earnest denial that he was at Mrs. Hatfield's house "*with said H. K. Shumate*," with the addition that—

"*To the best of his knowledge*, had never seen her until after the stipulation was filed in court; nor had any communication with her of any nature upon any subject whatever, and this affiant knows nothing of any agreement or any negotiation for same with said Hatfield other than is herein stated, and what he learned from said Shumate and V. A. Wilder, whose affidavit will be presented herewith, and said Hatfield never met said Flesher anywhere at any time pursuant to any agreement with this affiant."

Mr. Stiles does not deny that he did have with Mrs. S. D. Hatfield the conversation recited in her affidavit. He denies that he was at her house "with said H. K. Shumate," and that he had never seen her or "*had any* communication with her of any nature upon any subject whatever," "*until after the stipulation was filed in court.*"

Here are two negatives, each pregnant with the full admission of the truth of Mrs. Hatfield's statement. He may *not* have been at Mrs. Hatfield's house "with said Shumate,"

and he may *not* have been there "until after the stipulation was filed in court," and yet he may have been there with some *other man*, and *after* the stipulation was filed in court, and had the conversation as it is recited. He does not deny, but by the form of expression he employs he does tacitly admit, that he did have such conversation.

This intelligent, experienced lawyer, confronted by charges so grave—of a conversation had with a specified person at a particular place—would, if he could, have given direct, explicit, and unequivocal denial to the charge and have left nothing to implication or construction.

Shumate's Affidavit.

Mrs. Hatfield states that Mr. Shumate had long been her legal counsel, and that he brought Mr. Stiles to her house and introduced him to her; that this was "about the time the declaration in ejectment and restraining order were served upon her," in the year 1895, and that about two months later these same two persons returned and remained all night at her house, when the conversation with Stiles took place.

Now, Mr. Stiles is not a gentleman who once seen is easily forgotten. It is hardly possible that his person could be confounded with that of any other.

Mr. Shumate does not deny the statement made by Mrs. Hatfield. He does not deny that he did take Stiles to her house and introduce him to her. He has thought it enough to give in his affidavit a detailed account of a visit which he and "Colonel V. A. Wilder" paid to Mrs. Hatfield, and then say:

"To the best of affiant's recollection, M. F. Stiles, Esq., then and now counsel for Mr. King, was not present at either of the times aforesaid, and that Colonel Wilder was present to sanction the agreement. He has no recollection that Mr. Stiles was ever there with affiant—at any time."

Here is not only no contradiction of Mrs. Hatfield's statement, but the employment of language that appears to be evasive.

Mr. Shumate does not state that he and Mr. Stiles were not present together at the house of Mrs. Hatfield. He does not deny that he introduced Stiles to Mrs. Hatfield, but that "to the best of his recollection" Stiles was not present when he (Shumate) was there with Wilder, and that he "has no recollection" that Stiles was with him there at any time.

Now, this gentleman, like Mr. Stiles, is a lawyer, and appreciates the force and value of accuracy of expression. It cannot be a matter of mere "recollection" on his part, but must be of his distinct and positive knowledge, whether he was at the house of Mrs. Hatfield with Mr. Stiles in the year 1895, and especially whether after a first visit he returned there two months later with Mr. Stiles on business of such importance as this.

Mrs. Hatfield swears positively that they were there, and that the conversation recited by her did take place with Mr. Stiles. She is corroborated in this by the affidavits of *Aley Browning*, *T. H. Graham*, and indirectly by *Crockett Allison*, and by *A. M. Toler* (Exhibit No. 10) and *J. M. Toler* (Exhibit No. 11).

S. D. Hatfield and Nancy C. Rutherford have never become parties to the cause now pending here on appeal, either by service of process or by appearance in person or by counsel.

Both of them swear positively as to this.

Mrs. Hatfield says that—

"In the early part of February, 1901, she thinks about the 10th or 12th, she received a letter from Henry C. Flesher for her to come to Welch at once. That she was sick and could not go for a few days, but about a week later she did go, and for the first time she was then told by the said Henry C. Flesher that a suit had been brought in the Federal court before Judge Jackson by Henry C. King against her and her daughter, Nancy, and that the case had been decided against them, and that they had appealed the case to the Supreme Court of the United States. This was the first information of any kind that affiant ever had of this suit or of its decision; that no summons or other process therein was served on her" (Exhibit No. 7, p. 57).

Mrs. Browning (called Rutherford) says:

"That she had no notice or knowledge whatsoever that said suit was to be brought, or was brought; that no summons to answer in said suit was served upon her, or in any manner brought to her notice; that she never, in any manner or at any time, directly or indirectly, employed or authorized the said Henry C. Flesher to represent her in said suit, or to appear for her therein, or to represent her in any other controversy or matter pertaining to her said lands, or the title thereto, and that she never at any time, authorized any other person or persons to employ said Flesher or any other attorney to appear for or represent her in said suit," &c.

Now, how are these positive statements, made by the parties themselves, overcome, repelled, or in anywise shorn of their apparent force? The only person who attempts to controvert them, by affidavit, is Mr. Henry C. Flesher, who states that some time about May, 1895, he was employed by Mrs. Hatfield to represent her as her attorney in an action of ejectment brought by Henry C. King against her and Mrs. Rutherford and Mr. Claypool and others for the recovery of these lands, which action does not appear ever to have been determined. He then says, as to his appearance as attorney in this suit in equity:

"Of my absolute authority to represent the said Hatfield and Rutherford in the King litigation, I had and have no more doubt than that the plan of trial agreed upon was advantageous to them."

Just exactly what this means is not at all apparent. He does not pretend that he had any color of authority from Mrs. Rutherford, whom it does not appear that he had ever seen, and his only excuse for assuming to appear for Mrs. Hatfield in this chancery suit is that she had employed him to appear for her in an ejectment suit for the same property three years before.

He then states that—

"Considerable time after the filing of the bill in the present case, M. F. Stiles, one of the attorneys for the complainant therein, meeting me, on the street at Welch, told me he had filed the same, stating the general nature of it, and asked me whether I would accept service, or waive process for the defendants and avoid the cost of sending a marshal more than 200 miles to make service. I told him to send me a copy of his bill when he got home, and I would see what to do. Soon after he sent me a copy."

He then states that he examined the bill and concluded that the proper defense was by demurrer, and says:

"I therefore framed the demurrer to what appeared to me the vital point and one defect in their case, and at the next term of the court at Charleston presented it in person in court, having that day notified said Stiles, whose office was opposite the court-house, that I would do so, and the demurrer was, by order made in open court, set down for argument and after brief oral discussion was submitted, the court being supplied with copies of all the briefs that had been filed by all the counsel in the case of King *vs.* Mullins, in this court."

The demurrer was overruled; and says:

"After the decision of the case, there was nothing to do but do nothing or appeal. I wrote Mrs. Hatfield the result and that I would appeal, and did so. Somewhat later, at my request, she came to see me, and fully approved my course in the case. Her approval and attitude will appear from a letter received from her some time after, and hereto attached," &c.

Mr. Flesher then states what appears to be his sole ground for assuming to act for these persons. He says:

"At the time the suit was brought, and I appeared to it, I still had the papers of Mrs. Hatfield and Mrs. Rutherford, as I supposed her name still to be, not having heard about her second marriage, and no suggestion of any revocation of my authority had been made by or on behalf of either of them. Mrs. Rutherford had sanctioned and ratified the action of Mrs. Hatfield in employing me to represent her *in the first place, and I had no doubt about my continued authority to act for them.*"

These statements suggest some pertinent inquiries.

How did Mr. Flesher's employment as attorney for Mrs. Hatfield in the ejectment suit in 1895 extend to and warrant his appearance for her, and his waiver of process to the bill in equity, which was not filed until the 8th of October, 1898?

When and where and how did Mrs. Rutherford authorize Mr. Flesher to appear for her in the ejectment suit?

Why does not Mr. Flesher produce the letter which he says that he wrote to Mrs. Hatfield after his demurrer was overruled?

Although his reason for waiving process was to "avoid the cost of sending a marshal more than 200 miles to make service," yet why did he not write to Mrs. Hatfield and advise her of the suit, and obtain her instructions?

When and where and how did Mrs. Rutherford "sanction and ratify the action of Mrs. Hatfield in employing" Mr. Stiles to represent her "in the first place"?

All these and many more like inquiries are suggested by Mr. Flesher's statement, the full replies to which might reasonably be expected to appear in the statement itself.

It may be enough for the present purpose to call attention to the facts appearing in the case of *Shelton vs. Tiffin et al.*, 6 Howard, 186, where the judgment rendered on an appearance by an agent was held to be a nullity because "it does not appear that he had authority to waive process and defend the suit."

On this point, then, we submit that the appearance and the waiver of process and the stipulation to dispense with answer to the bill were all wholly without color of authority and the decree made on the bill was a mere nullity.

Irregularity of the Proceedings in this Cause in the Lower Court.

It is admitted by Messrs. Stiles and Flesher that there was no process *issued* as to the defendants; that the case was submitted on bill and demurrer "after a brief oral discussion," and that when the demurrer was overruled, Mr. Flesher, as counsel for defendants, did "decline to make other answer to said bill and elect to stand upon their said demurrer" (Record, p. 44).

Mr. John A. Sheppard testifies ("Petitions and Exhibits," p. 99) that on inquiry made by him of J. T. Watters, deputy clerk of the United States circuit court, at Charleston, West Virginia, he was informed by that officer that Mr. M. F. Stiles had brought to the clerk's office—

"a typewritten copy of what he called the record in the case of King *vs.* Sarah D. Hatfield and Nancy C. Rutherford, and requested said deputy to certify the same, which the said deputy refused to do, stating that he did not have the file of papers; whereupon said Stiles returned to his own law office and brought back the file of papers, but that said deputy clerk still refused to certify the copy, stating to said Stiles that the file had not been in his office, and that there were orders in the file indorsed to be entered by the district judge, but not in fact entered, and that if he, said Stiles, wanted the record certified he would have to go to Parkersburg, to Colonel Dellicker, the clerk; that said Stiles insisted upon said deputy certifying the record, and stated that he was anxious to have the same done, so as to send it at once to the city of Washington to procure an appeal, and that all parties to the suit were equally anxious, and that he, said Stiles, would see that the cost of the record was paid, but that said deputy still refused to certify the writing."

Further, the clerk of the circuit court of the United States for the southern district of West Virginia certifies that all of the law and chancery order books of the United States circuit court, sitting at Charleston, are in his custody; that he has "carefully examined the law and chancery order books in my custody from the time of entry of the final decree of the 2d day of June, 1900, in the equity cause styled Henry C. King *vs.* S. D. Hatfield *et al.*, and I find no decree or order whatsoever upon the said books filing any petition for an appeal from said final decree, or any order or decree allowing an appeal therefrom or approving any appeal bond."

Now, does Mr. Stiles, in his affidavit, deny any of the specific statements made by the deputy clerk? Does he deny that he, the counsel for the winning side, took the typewritten paper to that clerk and insisted upon having it certified as a true copy of the record of this case, in order to make an appeal to this court?

Does he deny that records of the court contained no entries of the order and decree, which the judge of the court had indorsed to be entered?

Does he deny that there was no entry of an appeal applied for or allowed or of an appeal bond?

Does he deny any one of the specific allegations made in the petitions?

His only denial is this (Stile's affidavit, p. 11):

"And affiant further says that this suit was regularly brought and regularly proceeded in, and any statement to the contrary is not true and is an unwarranted reflection *upon the circuit court.*"

And all that Colonel Buttrick, whose name is signed to the bill as co-solicitor with Mr. Stiles (Record, p. 11), says:

"That said cause was regularly on the docket of said court and was regularly called as all other cases when reached, and this affiant was in court at the time the demurrer to said bill was overruled in May, 1900, the announcement of said ruling being made in open court, upon the call of the docket, in the presence of a large number of the bar, and affiant distinctly remembers that some member of the bar commented to the court upon said cause and the court's ruling thereon" (Buttrick's affidavit, p. 26).

But the court's record shows and Mr. Shumate admits that the cause was *not* "regularly proceeded in." No subpœna or summons to answer the bill had ever issued from the clerk's office, and the cause could not have been on the rule book in the clerk's office. In fact, the bill and the demurrer thereto were placed in the hands of the court on the 8th day of June, 1899.

The demurrer is certified by H. C. Flesher, and he alone makes oath that it is not interposed for delay.

Rule 31 of practice in equity in the Federal courts requires that such affidavit shall be made by the "defendant," and does not permit it to be made by the counsel.

The case presented to the court, then, is this: This case stands on the docket of this court as an appeal by two women, against whom a decree had been made by the lower court. One of them comes here by her petition and alleges that the attorney who appeared to represent her in the court below and on this appeal had acted altogether without authority from her.

She files the affidavits of herself and her codefendant in support of her petition.

Other persons come in by petitions and show their interest in the subject-matter, and file affidavits and transcripts from public records and certificates of public officers. Among these is the State of West Virginia, whose legislature and board of public works have required the intervention of the State, by counsel, in this cause. Charges deeply affecting the professional character and conduct of Maynard F. Stiles and Henry C. Flesher are made directly and specifically in these petitions, and facts and circumstances are distinctly and clearly charged, and are set out in the affidavits, which support the charges so made; these defendants appear in court, and, on their motion, 15 days, which is extended to 20 days, is allowed them, within which time to obtain affidavits in rebuttal of those filed with the petitions.

Surely, now, two attorneys-at-law, one of them 66 years of age, and who has spent his entire life in West Virginia, charged with the course of professional conduct here so particularly set forth, should bring from their brethren of the bar a cloud of witnesses to repel with indignation a baseless or an exaggerated charge, the facts as to which must be within the personal knowledge of many of them.

The matters alleged in the petitions and affidavits are, if not true, easily susceptible of refutation and disproof. Beyond all question, they are each and all open to direct, positive, and explicit denial by the two persons so charged. What do we find, now, on the submission?

The only witnesses, out of all the bench, the bar, and the people of West Virginia, whose affidavits can be procured

are those of Maynard F. Stiles and Henry C. Flesher, the two persons charged; of H. C. King, the plaintiff in the cause; E. L. Buttrick, one of the counsel, whose name is signed to the bill; H. K. Shumate and V. A. Wilder, who appear by the record to be implicated in the transaction here impeached. Of Col. E. L. Buttrick we are bound to say that no imputation of any kind can attach to him. He stands far above reproach and criticism as a lawyer, as in other days he did as a gallant soldier; but from the two persons charged there cannot be found one clear, positive, distinct denial of any one of the charges made in the petitions or of the matters set out in the affidavits, but all such denials are vague, general, equivocal, and evasive.

King or His Attorneys Have Paid All the Costs and Expenses of This Litigation.

Mrs. Hatfield states in her affidavit ("Petition and Exhibits, Exhibit No. 7, p. 55) that Mr. Stiles told her in 1895, speaking of the ejectment suit, "that she should not have to pay any lawyer fee or costs." Mr. Stiles does not deny this. Mr. Rhodes states (Exhibit No. 27, p. 109) that in his conversation with Mr. H. C. Flesher on the 18th of October, 1901—

"I further asked him who paid for copying the record for appeal, and if he had anything charged to my client, Nancy Browning. He replied, 'Your client has not paid anything, has she?' To which I said, 'No.' He said, 'Well, there is nothing charged against her; the copying of the record has been settled, and if your client has paid nothing, she has no right to kick, and my appearing for Sarah D. Hatfield and Nancy C. Rutherford has in no way prejudiced their

rights, for they will both be taken care of, regardless of how the suit is decided in the Supreme Court.'"

With Mr. Flesher's affidavit there is exhibited a letter to him from Mrs. Hatfield, of date February 27, 1901, on which he seems to rely as a ratification of his appearance and action for her in this suit. This letter concludes thus:

"Have Mr. Ieager to settle the cost of my suit and send me a receipt. I want to be ready for all that comes around."

It might be enough to say, as to this, that it does not appear what "suit" she referred to, nor whether Mr. Ieager did settle the costs and send her a receipt. Certainly no receipt or evidence of payment on her account is produced, nor any affidavit from Mr. Ieager offered here. But this letter of Mrs. Hatfield is readily accounted for when we read Mr. Sheppard's affidavit (Exhibit No. 1, p. 37), in which he says that his first interview with Mrs. Hatfield was about February 20, 1901, at which time she declined to tell him what arrangement she had made, and he then pointed out to her the evil consequences that might follow from her conniving with those who were suing her. He then says:

"She came to my office in company with said Allison, *a month or two later*, and told me she had been thinking over what I had said to her when there before, and that she did not know that the arrangement she made with King's representative would operate to the prejudice of any other person, and after thinking the matter over fully she had decided she would tell me what she had done," &c.

Her letter to Flesher was dated February 27, 1901, one week after her first interview with Mr. Sheppard, and nearly two months *before* her second interview, and Sheppard is

confirmed by the affidavit of Mr. Crockett Allison. But it will be observed that Mr. Flesher makes a very questions able denial of Mr. Rhodes' testimony. The only feature of it he feels warranted in contradicting is the single sentence he quotes. He says:

"I did not tell him that 'they will both be taken care of, regardless of how the case is decided in the Supreme Court,' but I did say that their rights would be taken care of without reference to him, or something to that effect."

Reference to the books of the clerk's office of this court will reveal that nearly two-thirds of the costs paid there on this appeal have been paid by Mr. Stiles, the counsel for the appellee.

We have not thought it necessary to refer to the temper and terms in which Mr. Stiles has indulged himself in his *affidavit* in referring to some of the gentlemen who appear as witnesses for these petitioners. Indignant resentment is pardonable when the righteous are unjustly charged, but it does not usually express itself in a *tu quoque*. When an intelligent lawyer is charged with having had the conversation which Mrs. Hatfield swears she had with Mr. Stiles on the occasion of his visit to her house in company with Mr. Shumate, such intelligent lawyer, if he had not had such conversation, would hardly content himself with the statement that he was never there "*with said H. K. Shumate*," but would deny that such conversation, at any time and under any conditions, ever occurred.

HOLMES CONRAD,
EDWARD C. LYON,
For Petitioners.

No. 221.

Brf. of Hubbard for Intervenors.

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OCTOBER TERM, 1901.

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SARAH D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

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HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WEST VIRGINIA.

BRIEF FOR INTERVENORS.

W. P. HUBBARD.
C. W. CAMPBELL.
JOHN H. HOLT.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1420

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BRIEF FOR INTERVENORS.

STATEMENT OF CASE.

In the latter part of 1893 Henry C. King purchased the claim of one Le Moyne to a tract of 500,000 acres of land, known as the Robert Morris tract and situate in the States of Virginia, West Virginia, and Kentucky. This land was originally granted by the Commonwealth of Virginia to Robert Morris in the year 1795, and in consequence of various transfers, statutory and otherwise, was finally claimed by the said Le Moyne, who sold and conveyed the same, as aforesaid, to the said King.

None of the claimants of the Morris title from the year 1830 down to the year 1863, when the State of West Virginia was formed out of the State of Virginia, ever entered said land in the State of Virginia on the books of the commissioner of the revenue and caused any taxes to be charged thereon or paid any taxes whatsoever in any or either of the counties where said land is situate, in consequence of which the title thereto became forfeited to the Commonwealth of Virginia, and that portion thereof situate in the new State passed thence into the State of West Virginia, on her formation, except such parts thereof as had been before granted to sundry patentees. This forfeiture has never been released or redeemed.

After the formation of the State of West Virginia the predecessors of Henry C. King undertook to redeem this land from forfeiture in the courts of West Virginia, and in 1883 obtained some such decree; but since that date said land has not been entered upon the land books of any of the counties of the State of West Virginia, where the same is situate, and no taxes have been charged thereon or paid by the said King or any person or persons under whom he claims, and in consequence thereof, and by virtue of the provisions of section 6 of article 13 of the constitution of the State of West Virginia, even if the redemption of 1883 should be held to be good, the land has once more become forfeited and the State's title thereto transferred to the junior occupants thereof.

Divers and sundry portions of said land have from time to time from 1800 been granted by the Commonwealth of Virginia to actual settlers, who and whose descendants and grantees have cleared away the forests, improved the land,

and regularly paid the taxes thereon. Other portions of said land have in like manner been granted to settlers by the State of West Virginia.

Notwithstanding the forfeiture of his title to this land and his failure to redeem the same, and notwithstanding the transfer thereof to the junior patentees and occupants thereof, the said King, shortly after his purchase from Le Moyne, as aforesaid, came into the State of West Virginia—that is to say, in the year 1895—and instituted in the circuit court of the United States for the district of West Virginia a number of actions of ejectment against the grantees of this land from the two States of Virginia and West Virginia and their assigns. One of these actions was against S. S. Altizer and one hundred and twenty-three other defendants, including Sarah D. Hatfield and Nancy C. Rutherford, the appellants here, and also Alex. McClintock, John McClintock, and M. B. Mullins. Another of these actions was against Asa Aliff and ninety-six other defendants. Another was against Conley Blankenship and fourteen other defendants.

The first-named action was tried as to Alex. McClintock, John McClintock, and M. B. Mullins, resulting in a verdict and judgment in favor of said defendants on instructions from the court to the jury to the effect that Henry C. King's claim of title was outstanding in the State of West Virginia by forfeiture for non-entry and non-payment of taxes. This judgment was reviewed on a writ of error prosecuted by the said King in this court and was affirmed.

All of these actions of ejectment are still pending and undetermined, and many, if not all, of the intervenors here are parties thereto. In addition to this, there is pending in the courts of the State of West Virginia a proceeding on behalf

of said State to sell said lands for the benefit of the school fund, except in so far as junior claimants thereof may be protected by the Constitution, and there are likewise still pending and undetermined, both in the State and Federal courts of said State, a great many chancery causes instituted by the said King against the intervenors here and others relative to these lands.

With all these litigations pending, the present suit of Henry C. King against Sarah D. Hatfield and Nancy C. Rutherford (now Nancy C. Browning) was instituted. It has for its object the cancellation of the defendants' title to several tracts of land, aggregating about one thousand acres, and alleged to be located within the boundaries of the 500,000-acre tract, and the plaintiff's bill, in order to give the court jurisdiction for the cancellation of the defendants' title as a cloud, alleges that King is in possession of the land. It also alleges the unconstitutionality of the West Virginia forfeiture laws, and one Flesher, a practicing attorney, professing to represent the defendants, appeared and demurred thereto. The demurrer was overruled and a final decree permitted to be entered thereon without the intervention of any answer on the part of the defendants or either of them, although they had a complete defense to the suit and a perfect title to the land in controversy under the West Virginia law, in consequence of their actual adversary possession of the same for the period prescribed by the statute.

After this decree had been obtained an appeal was taken by Flesher for the defendants to this court, where the matter now pends, and during its pendency not only the intervenors here, but the defendants to said suit, the said Sarah

D. Hatfield and Nancy C. Rutherford, heard of its existence for the first time, and that the court below had held the forfeiture laws of the State unconstitutional; and feeling that they would be injuriously affected by such a precedent, and suspecting that the suit was fictitious and collusive, having for its object, not the settlement of a controversy between the plaintiff and the defendant, but the procurement of a precedent injurious to others, they began to investigate the origin and history of the suit, and their worst suspicions were soon strengthened. It was discovered that Flesher did not represent Nancy C. Rutherford (now Nancy Browning) and had no authority to appear for her, either in the circuit court or to appeal therefrom in her name to this court. These facts she embodied in an affidavit. In addition to this the intervenors were persuaded that Henry C. King, desiring to obtain an opinion of this court upon the constitutionality of the forfeiture laws of the State of West Virginia that would be prejudicial to their title and interest and to the interest of the other defendants in the various actions of ejectment, instituted the present suit in the circuit court, and, through his counsel, M. F. Stiles, procured Henry C. Flesher, an attorney practicing in said court, to appear thereto, without any authority whatever as counsel for the defendants thereto, without their knowledge or the knowledge of either of them, and to make such defense thereto as would falsely give the court jurisdiction, omitting the defense of the statute of limitations, and present the constitutional question aforesaid in as favorable a light as possible to the contentions of the said King. In other words, these intervenors, be-

lieving said suit to be not only a fraud and a fiction, trumped up by the counsel for King, and conducted on both sides by his counsel, not for the purpose of settling a real controversy between King and the defendants, but for the purpose of obtaining an opinion from this court hurtful to the interests of others not parties to the record, filed numerous affidavits with the clerk of this court showing these facts, and made them the basis of various petitions for leave to intervene for the purpose of moving that the decree herein be reversed and this cause remanded.

GROUNDS OF MOTION.

The grounds for this motion, as stated in the petition of A. M. Toler, as well as in the petition of Arthur D. Bright, furnish a fair illustration of the position of these and the other intervenors, and are as follows:

1. *Because the suit is fictitious and collusive.*

2. *Because the suit was instituted and is now prosecuted, not to determine any real controversy between the parties to the record, but to obtain a decree on which to prosecute actions of ejectment against persons really interested adversely to the appellee, but not parties to the record, and, among them, these intervenors.*

3. *Because this suit is a fraud upon and in contempt of this and the circuit court.*

These grounds of motion are practically but different statements of the same thing; for, if the first be true, and the suit fictitious and collusive, then the second but states the object of that fiction and fraud, and shows the effect thereof upon the intervenors, and the third, that the same is a contempt of court, follows as an unavoidable sequence.

These matters may therefore be discussed, both upon the law and the facts, as a single point.

In the first place, the record of this cause shows that Henry C. Flesher appeared in the circuit court as counsel for the defendants Sarah D. Hatfield and Nancy Rutherford, and in their names demurred to the plaintiff's bill, and, further, as their representative, signed a statement of facts purporting to have been agreed between them and Henry C. King, the plaintiff; and the affidavit of Nancy C. Browning (Exhibit No. 6, pages 50–52) emphatically states and conclusively shows "that she never in any manner, or at any time, directly or indirectly, employed or authorized the said Henry C. Flesher to represent her in said suit, or to appear for her therein, or to represent her in any other controversy or matter pertaining to her said land, or the title thereto; and that she never at any time authorized any other person or persons to employ said Flesher, or any other attorney to appear for or represent her in said suit; that she never authorized said Flesher to sign for her the agreement in writing purporting to have been made between Henry C. King, this affiant, and her mother, Sarah D. Hatfield."

Sarah D. Hatfield testifies that she did make an arrangement with M. F. Stiles, attorney for Henry C. King, by

which the said Stiles employed H. C. Flesher to represent her in an action of ejectment that had been brought in the United States court at Parkersburg by King against Simon Altizer, herself, William Claypool, and others, but "that she did not contemplate any other suit or know that any other suit would be brought against her by the said Henry C. King." She also says that she never knew of the institution or pendency of the present suit until after it had been decided against her and appealed to this court, and "that no summons or other process therein was served upon her" (Exhibit No. 7, pages 56 and 57), and the paper signed by her July 1, 1895, ratifying the action of Henry C. Flesher in the case of King against Altizer and others, confirms her statement that the employment of Flesher for her was strictly confined to the case of King *vs.* Altizer *et al.* (Exhibit 7, pages 63 and 64).

The affidavit of Mr. S. U. G. Rhodes (Exhibit No. 27, pages 109 and 110) shows that the costs upon both sides of the present litigation and of the present appeal have been borne by King or Flesher or by both, or at least by some one other than the defendants, and that it was the purpose of Flesher that the defendants should be taken care of, "regardless of how the suit is decided in the Supreme Court."

From these things it becomes perfectly apparent that this litigation has been manufactured by M. F. Stiles, attorney for Henry C. King, and Henry C. Flesher. The suit was instituted by Stiles for King without the knowledge of the defendants, for no process was issued against or served upon them, and was defended, after a fashion, by Henry C. Flesher, who appeared without authority.

The object of this fictitious suit and collusive enterprise

likewise becomes apparent when we reflect that it involves the constitutionality of the West Virginia forfeiture and transfer laws, and that the same questions are involved in the many ejectment and other suits now pending in the name of King against these intervenors and others. The object is the obtaining of a precedent, and not the settlement of a genuine controversy, and this object becomes the more apparent when we further reflect that King's bill did not make other persons interested in the particular land parties defendant. Prior to the institution of this suit Joseph Hatfield and Sarah D., his wife, and one of the defendants here, had conveyed to one Henry R. Phillips, trustee, "all the coal, gases, salt water, oil, and minerals of every description" in a portion of this same land, and, at the date of its institution, during its pendency, and at this time, said minerals were and are owned either by the said trustee or Arthur D. Bright, and yet neither was made a party defendant (affidavit of Claude Gaujot, Exhibit No. 13, page 74; Exhibit Deed to said affidavit, page 76, and petition of Bright, page 33); also at the date of the institution of said suit A. M. Toler was interested in a portion of said land and still is, yet King did not make him a party thereto (petition of Toler, pages 29 and 30; also affidavit of Toler, Exhibit No. 23, page 101). From this it is evident that the object of the suit was not to recover the particular land involved, but to establish a precedent against others; otherwise King would not have sued alone for the surface, or mere shell, but would have also sought to recover the kernel, or mineral beneath the surface. If there should remain any doubt upon the question of King's object and design, it

becomes clear when we learn from the affidavit of S. U. G. Rhodes that King did not even seek the shell, for it is there stated that Flesher said that "they" (meaning the defendants Sarah D. Hatfield and Nancy C. Rutherford, the owners of the surface) "will both be taken care of, and that is enough for me to say to you" (affidavit of Rhodes, Exhibit No. 27, page 110).

The *aroma* of the transaction and its object is further emphasized and illustrated by the secrecy with which it was conducted (affidavit of W. E. Chilton, Exhibit No. 2, page 42, and affidavit of W. R. Thompson, Exhibit No. 3, p. 45), and by the fact that it is not the first offense of the participants therein; but they have probably become hardened in their "trespasses and sins." (See affidavit of William Claypool, Exhibit No. 14, page 80; affidavit of Amanda Claypool, Exhibit No. 15, page 82; Exhibit No. 19, page 86.)

The affidavits filed in opposition do not, in our judgment, meet the question or constitute even a partial defense to the charge. They are the affidavits of M. F. Stiles, attorney for King; H. K. Shumate, also his attorney; V. A. Wilder, his agent; E. L. Buttrick, another attorney for King, and Henry C. Flesher, who represented the appellants herein. No outside person speaks in corroboration of them.

The affidavit of M. F. Stiles is largely devoted to an immaterial history of the antecedent King litigation in West Virginia, and to complaints against junior claimants of the land in controversy therein, because of their resistance of his attempted redemption of his title (just as if people attacked would not resist), and to criticism of others rather than to a defense of himself. He does, however, deny that he was ever at the house of Sarah D. Hatfield in company

with H. K. Shumate (Stiles, p. 5); but Mrs. Hatfield is sustained in her contrary contention by the very explicit affidavits of Aley Browning and T. H. Graham filed in rebuttal of Mr. Stiles (Aley Hatfield, pp. 1 and 2, and T. H. Graham, p. 3). He also denies that Flesher represented King in this or any other suit (Stiles, p. 12), and, while this may be true in the sense that King never paid Flesher an actual retainer, still the ear-marks upon the record would indicate that Stiles and Flesher were very accommodating to each other in arranging the institution of this suit, prescribing its scope, and appealing from its decree. When Stiles got ready to bring it he applied to Flesher to waive process, and the latter did it without authority by appearing and demurring (affidavit of Flesher, p. 44). And, when Flesher got ready to appeal it, his victorious antagonist, Stiles, arranged it for him by seeing the clerk and guaranteeing the payment of fees (Stiles' affidavit, p. 15).

All that it is necessary to say about the affidavit of H. K. Shumate is that to the best of his recollection it was Wilder who was at the house of Sarah Hatfield with him instead of Stiles (p. 20), and further, at page 21, he disclaims all knowledge of or participation in the present suit.

Wilder would appear to corroborate Shumate relative to the visit of the latter to the house of Mrs. Hatfield, but he neither knows, or pretends to know, anything about the origin, conduct, or history of the present litigation.

The affidavit of E. L. Buttrick discloses little, if anything, material to the present motion (pp. 26 and 27).

It appears from Flesher's affidavit that he was employed in 1895 by Sarah D. Hatfield, through H. K. Shumate, then

one of King's counsel, to defend for her and her daughter an action of ejectment instituted by King against her and others, which employment was subsequently ratified by Mrs. Hatfield, and that, in pursuance of such employment, he subsequently signed for her, her daughter, and William Claypool the stipulation, a copy of which is exhibited with his affidavit (Flesher, pp. 41–44). This, it will be borne in mind, was years before the institution of the present chancery suit; and, further, that his then employment was confined to the action of ejectment (see power of attorney attached to affidavit of Sarah D. Hatfield, p. 63) and had no relation to the present suit in equity. Notwithstanding this fact, however, it further appears from his affidavit that some three years afterward and without any other employment whatever, without the knowledge either of Mrs. Hatfield or Mrs. Browning, he appeared and represented both of them in the present suit, obviated the necessity of process by appearing for them, and never even communicated with either of them until after a final decree (Flesher, pp. 45, 46).

In other words, his utter lack of authority to represent them or either of them appears from his own affidavit. He does, however, say, at the top of page 46, that Mrs. Hatfield subsequently ratified his conduct, and files with his affidavit her letter of February 27, 1901, in confirmation of his statement (p. 49); but an examination of this letter discloses no reference to this case, and even if it did, it does not in any way contradict Mrs. Hatfield's affidavit, filed in support of this motion.

Similar cases to the one at bar, and involving the identical principle involved here, have been repeatedly argued before and decided by this court. We cite some of the

leading ones for the purpose of reminding the court of the principles laid down and relief granted by it under such circumstances. They are:

Lord *vs.* Veazie, 8 How., 251 (L. C. P. Ed., Book 12, page 1067).

Chamberlain *vs.* Cleveland, 1st Black, 419 (L. C. P. Ed., Book 19, page 93).

The American Wood Paper Company *vs.* Heft *et al.* (Supreme Court), L. C. P. Ed., Book 19, page 378.

The American Wood Paper Company *vs.* Heft *et al.*, 8 Wal., 333 (L. C. P. Ed., Book 19, page 379).

Little *vs.* Bowers, 134 U. S., 557.

South Spring Company *vs.* Amador Gold Company, 145 U. S., 300.

Lord *vs.* Veazie, *supra*, was a case brought up by writ of error from the circuit court of the United States for the district of Maine, and a motion was made in the Supreme Court by persons interested, but not parties to the record, to dismiss the appeal upon the ground that it was a fictitious case, got up between the parties thereto for the purpose of settling legal questions upon which the parties moving had property interests depending. Various documents and affidavits were filed in support of the motion, and it was argued in support of the motion that the suit was fictitious and instituted by persons to try the rights of third parties; that any person as *amicus curiæ* might make the motion; that a suit may be shown to be fictitious either by inspection of the record or by evidence *aliunde*, or by both; that the appellate court sits for the correction of errors of inferior courts and not to

adjudicate upon the agreement of parties; and, among other things, and as showing that the suit was a fiction, concealment of its institution from interested parties was urged. The judgment of this court upon the motion was that the writ of error be dismissed, and the cause remanded to the circuit court, "to be dealt with as law and justice may require," and Mr. Chief Justice Taney, in delivering the opinion of the court, said:

"The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse, and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be. A judgment entered under such circumstances, and for such purpose, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the circuit court, undoubtedly suffered the judgment *pro forma* to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity and no writ of error will lie upon it."

Neither is Lord *vs.* Veazie distinguishable in principle from the case at bar. The difference in fact between the two cases seems to be that in the former the collusion was between the parties plaintiff and defendant, while in the latter it is insisted that the collusion has been between the

attorneys, Stiles and Flesher, the one representing the plaintiff, and the other professing to represent the defendants, but without their knowledge or authority, and actually in the employ of the plaintiff or the plaintiff's attorney. It seems to us that the collusion of attorneys, under such circumstances, they being officers of the court, would be more reprehensible, if anything, than collusion between parties.

Neither can it be said that there is no such necessity for the motion here as existed in Lord *vs.* Veazie, upon the theory that the appellants have the right, even in the absence of any motion, to dismiss their appeal, if they so choose; because Sarah D. Hatfield, one of the appellants, is making no such motion here, and is not represented by any of the counsel for the intervenors.

In Chamberlain *vs.* Cleveland, *supra*, Lord *vs.* Veazie, was cited with approval and followed, and it was there held, according to the syllabus of the case—

"Where it appears from affidavits and other evidence filed in behalf of persons not parties to the suit, that the appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision of this court to affect the interests of persons not parties, the appeal will be dismissed."

The American Wood Paper Company *vs.* Heft *et al.* (first cited above) was a motion for leave to intervene and to move to dismiss the appeal upon the grounds that the suit was fictitious, and was prosecuted, not to determine a real controversy, but to obtain a decree on which to found future litigation against persons really interested, but not parties to the

record. The affidavits filed in support of the motion did not seem to have been sufficient to convince the court that the appeal should be dismissed without further investigation, but were sufficient to cause the court to issue a rule to show cause why the suit should not be dismissed, under which both parties were given leave to take and file depositions in support of and against the motion. After the rule had been awarded and the depositions taken, and it appearing therefrom that there was no genuine controversy between the parties, the court dismissed the appeal. This was the judgment in the second report of this case, *supra*.

In Little *vs.* Bowers the same principles were announced by Mr. Justice Lamar, and the cases of Lord *vs.* Veazie, Chamberlain *vs.* Cleveland, and the Wood Paper Company *vs.* Heft were cited and relied upon.

The case of The South Spring Company *vs.* Amador Gold Company is cited, not so much for the purpose of further illustrating the principles supposed to be involved here as for the purpose of showing the relief there granted upon the motion. The order of the court was, not that the appeal be dismissed, but that the judgment be reversed and the cause remanded for further proceedings in conformity to law.

It will be seen, therefore, that where a collusive or fictitious suit is shown, or where it appears that the plaintiff or defendant was in the beginning or became the *dominus litus*, on both sides, the court will, according to the circumstances of the particular case, either simply dismiss the appeal, as in The Wood Paper Company *vs.* Heft, or dismiss the appeal and remand the cause, as in Lord *vs.* Veazie, or reverse the judgment of the court below and remand the

cause, as in The South Spring Company *vs.* The Amador Gold Company.

And it is respectfully insisted here that the face of the record in this cause and the affidavits filed in support of the motion show, not only that the present suit is fictitious, as distinguished from a real controversy, but that it is the result of collusion between the attorneys Stiles and Flesher, and, further, that King, the plaintiff, through his attorney, Stiles, has from first to last been master of the litigation on both sides.

W. P. Hubbard.
C. W. Campbell.
John H. Holt.

Supreme Court of the United States.

OCTOBER TERM, 1901.

NO. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
Appellants.

vs.

HENRY C. KING, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Upon Petition of STUART WOOD and Others for Rule Against Henry C. Flesher, and to Remand the Cause.

Brief of Counsel for State of West Virginia.

STATEMENT.

This suit was instituted in the Circuit court of the United States for the District of West Virginia, for the purpose of annulling certain instruments of writing, under which the defendants claim title to certain lands in said state, and which said instruments of writing, the complainant alleges, constitute a cloud upon his title to a tract of land claimed by him, being the so-called Robert Morris 500,000 acre grant, made by the Commonwealth of Virginia to Robert Morris in 1795. The bill was filed October 8th, 1898, and Henry C. Flesher, an attorney practicing in said court, accepted ser-

vice for the defendants, entered their appearance in said suit, and demurred to the bill. The ground assigned for demurrer is that it appears from said bill that the title to the land claimed by complainant was, by the Constitution of West Virginia, forfeited to said state December 31st, 1888, and that by reason of said forfeiture, and the proceedings had thereunder, the title to the tracts of land in litigation in this particular suit, vested in one Joseph Hatfield, under whom the defendants claim.

The demurrer further shows that it being provided by the act of the Legislature of West Virginia of February 28th, 1893, under which suit was brought in which complainant claims to have redeemed the land claimed by him, that the suit should be dismissed as to any land that appeared to have been sold in any proceeding for the sale of school land, and, therefore, said suit could not properly be maintained, nor any degree of redemption properly entered that should effect the lands claimed by these defendants, under the sales to said Joseph Hatfield, by the commissioner of school lands, and, therefore, complainant ought not to maintain this suit.

This demurrer was overruled and leave given to the defendants to file their answer. Flesher, as counsel for the defendants, declined to file an answer, but elected to stand on the demurrer. The final decree was entered June 2nd, 1900, and some time later an order allowing appeal to this court.

Now comes a number of petitioners, all of whom claim title to land within the said 500,000 acre tract, and charge that the suit was fraudulent and fictitious from the beginning: that while Henry C. Flesher claims to be the attorney for the defendants, he is, in fact, the agent and attorney for the plaintiff, Henry C. King, and that he was never authorized or empowered to represent the defendants, or either of them in this suit.

This proceeding was brought to the attention of the officers of the State of West Virginia by the direct order of this court. Recognizing that the questions sought to be raised in

this cause, have an important bearing upon the revenues of the state, involving, as they do, a direct attack upon the constitution and statutes, and affecting the title to a very large area of land, the legislature authorized and directed the board of public works of the state to employ its attorney general and other counsel, if deemed advisable, to appear in behalf of the state. Being then Attorney General of the State of West Virginia, the board of public works, in pursuance of said action of the legislature, authorized and directed me to appear in this court to make such defense in this cause, and to take such action as, in my opinion, might be necessary to uphold the constitutional provisions aforesaid, and to maintain and preserve the property rights of the citizens of this state, vested in them by reason of the operation of said constitutional provisions and the statutes enacted thereunder.

As counsel for the state, I proceeded to examine the record in the case for the purpose of upholding, to the best of my ability, the validity of the constitutional provisions and statutes in question. Naturally, I first inquired into the history of the cause and the proceedings had in the Circuit court. Upon such investigation I was fully convinced that the suit was fictitious and fraudulent from the beginning, and that the sole purpose of said suit was to secure from this court a decision to subserve the interest of the plaintiff below. I was further convinced that Attorney Henry C. Flesher had no authority to appear for the defendants in the lower court, and that his appearance was in collusion with the attorney for the plaintiff. In other words, I am convinced that the allegations made in the petitions of the various claimants are true, and that the evidence collected and filed as exhibits in support of these petitions, so change the nature of this suit, that it is not only necessary, but that it would be even improper for me to prepare a brief in this proceeding defending the constitutional provisions and statutes in question.

If my view of the facts is correct, an unbroken line of decisions of this court shows that it will have no hesitancy in

dismissing this appeal, annulling the decree entered in this cause in the Circuit Court of the United States for the District of West Virginia, and setting aside all proceedings had herein in the said court, without considering the merits of the case.

ARGUMENT.

By a long line of decisions, this court has held that upon a motion, it will intervene and dismiss an appeal when it clearly appears that the suit is fictitious and that there is no real issue between the parties.

In the case of East Tennessee, Virginia & Georgia R. R. Co. vs. Southern Telegraph Company, 125th United States, 695, the court held: "It having been shown to this court that there does not any longer exist any real controversy between the parties to this suit about the matter originally involved, and that, by arrangement, the defendant in error is no longer a contestant in the cause, the court, after notice to the parties and hearing, dismissed the case with cost."

Again the court held in South Spring Hill Gold Mining Company vs. The Amador Medean Gold Mining Company, 145th United States, 302: "This court will not consent to determine a controversy in which the plaintiff in error has become the *dominus litis* on both sides."

American Wool Paper Company vs. Jacob B. Heft, 8th Wallace, 333; Henry S. Little, Receiver, vs. Samuel B. Bowers, et al., 134th United States, 547, are decisions to the same effect.

In People of the State of California vs. San Pablo & Tulare Railroad Company, 149th United States, 308, the court used the following language: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide

moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue before it. No stipulation of parties or counsel, whether in the case before the court, or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

From these decisions it clearly appears that this Honorable Court does not sit to determine moot questions for the gratification of private parties, or to subserve private interests. It can not afford thus to encourage litigation. Its duty is to determine disputed questions, when disputants fail to arrive at an agreement. It has always refused to hear and determine suits where there is no issue at stake. This proposition being true, how much more ought this court to refuse to hear a cause that was conceived in fraud, and conducted in such a clandestine manner as to elude the vigilance of active attorneys, who were employed to defend suits instituted by the same plaintiff for the purpose of recovering lands claimed under the same title? If this court has in the past refused to encourage litigation by hearing cases that were honestly instituted to determine actual disputes, but which were subsequently settled before the time set for hearing in this court, how much more ought it refuse to sit on issues fraudulently made by designing individuals, thus hoping to secure a decision that would subserve them in carrying into effect some nefarious scheme? That such is the object of this suit clearly appears from the exhibits filed with the petition in this cause.

Again the decisions of this court, in many instances, hold: "Where it appears to this court from affidavits or other evidence, filed by persons not parties to a suit, that there is no real dispute between the plaintiff and the defendant in the suit, but on the contrary that their interests is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit court entered *pro forma* is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed." Lord vs. Veazie, 8th Howard, 251.

In this same cause Chief Justice Taney, in delivering the opinion of the court, said: "It is the office of courts of justice to decide the rights of persons and of property when the persons interested can not adjust them by agreement between themselves—and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court." In the same case the court further says: "A judgment in form thus procured, in the eye of the law, is no judgment of the court. It is a nullity and no writ of error will lie upon it."

Chamberlain vs. Cleveland, 1st Black, 419, is a similar case to the one above. The court affirmed the doctrine by using substantially the same words in the syllabus, as is used in the syllabus of the case of Lord vs. Veazie, and further said: "There is no material difference between this case and that of Lord vs. Veazie, 8th Howard, 254, when the whole proceeding was justly rebuked by the court, as in contempt of the court and highly reprehensible." Again the court, in the same case, said: "We repeat, therefore, what was said by the court in that case, 'Any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law which a party desires to know for his own interest, or his own purpose, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court.'"

If this court holds it highly reprehensible and a contempt of court for an individual to carry on both sides of a suit for the purpose of obtaining a decision to advance his personal interests, how much more aggravated is the case at bar, where the party, in order to carry on both sides of the

case, goes, by attorney, to innocent women, who are ignorant of their rights and of the law applicable to their rights, and fraudulently makes representations for the purpose of obtaining a colorable right to appear for them in a suit, whose only end is to secure a decision from this court favorable to his contention, which will give him an advantage over other parties with whom he has litigation? To all intents and purposes no assent was ever given, and this is a case similar to those cited above, in so far as its being a proceeding carried on by one party, but differs in the respect of its being aggravated by the fraud of the attorneys who claimed to represent the parties to this suit. It is clearly apparent that the only purpose the plaintiff had in view was to secure a decision from this court, and that by default, that would be of service to him in securing other lands, the title to which he claims, in the same neighborhood.

The court felt called upon to say in Chamberlain vs. Cleveland, supra: "It is but proper to say that the counsel who have been employed in this case are entirely acquitted of any participation in the purpose of the party." But in the case at bar no such excuse can be made for the attorneys. They, indeed, it seems, are the guilty parties, and if the court felt called upon to make explanation clearing the attorneys in the above case from blame, it certainly will not hesitate in this case to punish the counsel who have been deliberately guilty of such an offense. If it is a "punishable contempt of court" for a private party to carry on both sides of a suit, how much greater offense is it for a practicing attorney to fraudulently carry on a suit to secure from the court a decision favorable to the interest of his client.

I wish particularly to call the attention of the court to the cause of Nelson F. Shelton vs. Clayton Tiffin & Lilburn P. Perry, 6th Howard, 163, as one which I consider very strong and very pertinent on this subject. Justice McLean, in delivering the opinion of the court, made the following statement of the case, which I quote in full:

"This is an appeal in Chancery from the Circuit court

for the Eastern District of Louisiana.

"On the 10th of April, 1838, the complainant below sold to one Samuel Anderson a plantation and negroes, situated in the Parish of Madison, Louisiana, for seventy-five thousand dollars. Thirty-five thousand dollars of this sum were paid in part, by surrendering a note which Anderson held against Lilburn P. Perry, the complainant, and his father, John H. Perry, for thirteen thousand dollars; and by the assignment of a note on H. R. Austin, J. B. Ragan and Wylie Bohannan, of the state of Mississippi, for eighteen thousand, two hundred and eighty ..o dollars and sixty-five cents, payable to Samuel Anderson on the 1st of April, 1839.

"A mortgage was executed on the plantation and slaves to secure the payment of forty thousand dollars, the residue of the purchase money. At the same time three notes or bonds were executed to Lilburn P. Perry by Samuel Anderson, each for the sum of thirteen thousand, three hundred and thirty-three dollars, payable on the 1st day of January, 1842, 1843 and 1844.

"On the 11th day of January, 1839, Mosely & Bouldin, citizens of Virginia, instituted a suit in the Circuit court against L. P. Perry and John M. Perry and obtained a judgment against them for seven thousand, five hundred dollars. An execution was issued, in virtue of which, under the laws of Louisiana, the marshal levied upon the three notes above stated and the mortgage, which were sold by him, on credit of twelve months to Samuel Anderson, the mortgagor, for five thousand dollars.

"Some time after this purchase, Robert Anderson, the father of Samuel, and Nelson F. Shelton, his uncle, having procured a judgment against Samuel Anderson in the State Court of Lousiana, sold the mortgage property and slaves, and they became the purchasers thereof and have the possession of the plantation and slaves under the purchase, claiming that the mortgage by Anderson to Perry has been extinguished.

"The decree of the Circuit court was entered against Samuel Anderson, Robert Anderson and Nelson F. Shelton et al., that within sixty days they should pay to the complainant forty thousand dollars, with interest from the 1st day of January, 1842, and in default of such payment that they should deliver to the complainants the possession of the plantation and the slaves. From this decree Shelton only has appealed."

The court said: "The greatest question in the case arises out of the judicial sale of the mortgage debt to Anderson, the mortgagor, under a judgment obtained by Mosely & Bouldin against L. P. Perry and John M. Perry. If by this sale the mortgage debt has been extinguished, no relief can be given to the complainants.

"Had the Circuit court which rendered the judgment jnrisdiction of the case? The plaintiffs were citizens of Virginia, John M. Perry was a citizen of Louisiana, and L. P. Perry, of Missouri. No process was served upon L. P. Perry, nor does it appear that he had notice of the suit until long after the proceedings were had. But there was an appearance by counsel for the defendants and defense was made to the action. This being done by a regular practicing attorney it affords *prima facie* evidence, at least, of an appearance in the suit by both the defendants. Any individual may waive process, and appear voluntarily."

John M. Perry acted in some matters as the agent of L. P. Perry, and wrote his attorney, one Mr. Crawford, that he would see upon the records of the Court of the United States a suit commenced against him and others by H. Mosely & Bouldin, and his wish to employ him to defend it. Crawford, the attorney, testified that he had no recollection of having received any authority directly from L. P. Perry, or from any one in his behalf, to defend the suit other than what might be inferred from this letter, "that he regards his appearance on behalf of any other person than John M. Perry in said suit as an inadvertance on his part." The court said this evidence does not contradict the record but

explains it, and further said: "An appearance by counsel under such circumstances, to the prejudice of the party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity and, consequently, did not authorize the seizure and sale of his property."

In the syllabus of the case the court laid down the law as follows: "Where a citizen of Virginia sued, in the court of Louisiana, two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri is at liberty to show that the appearance for him was unauthorized. If he shows this, he is not bound by the proceedings of the court, whose judgment as to him is a nullity."

In the light of these decisions this court will hardly hesitate to grant the petition of the State of West Virginia.

I deem it unnecessary to enter into any lengthy discussion of the law governing the disbarment of attorneys.

This court has held that the power to disbar an attorney "is possessed by all courts who have authority to admit attorneys to practice." Ex parte James S. Robinson, 19th Wallace, 505.

Again it has held in Randal vs. Brigham, 7th Wallace, 503, that "it is not necessary that proceedings against attorneys for mal-practice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from his own observation. Some times they are moved by third parties upon affidavits: and some times they are taken by the court upon its own motion. All that is requisite to their validity, is that when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and

defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

As to what grounds are sufficient to warrant the disbarment of an attorney, I understand it to be largely a matter within the breast of the court. The general rule stated in the American and English Encyclopedia of Law, Second Edition, Vol. 3, Page 302, is as follows: "In order for any acts or conduct to be ground for striking the name of an attorney from the roils, it is not essential that they be such as would subject him to indictment or to any civil liability; any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relation of attorney and client and the practice of law before the courts, or showing such a lack of personal honesty, or of good moral character as to render him unworthy of public confidence, constitutes a ground for his disbarment."

The standard of integrity laid down by this court, in Randall vs. Brigham, cited above, is as follows: "The confidence which they (meaning attorneys) receive and the responsibility which they are obliged to assume, demand, not only ability of high order, but the strictest integrity."

I deem it unnecessary to point to the numerous cases in the law books where courts, in the exercise of their summary jurisdiction, have ordered the names of attorneys to be stricken from the rolls. The case at bar is so clear that I feel that I can leave it to the court without further comment as to whether the attorneys in this case measure up to the standard laid down by this court, or measure up to the standard that should govern attorneys practicing in this, the highest court of our land.

On the whole, I most respectfully submit that each and every point of the motion made by the State should be sustained.

EDGAR P. RUCKER,
Counsel for the State.

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Lord vs. Veazie. 8th Howard, 251.

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Randall vs. Brigham. 7th Wallace, 503.

American and English Encyclopedia of Law. Second Edition, Vol. 3, Page 302.

No. 221.

Affidavits in Rebuttal

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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

AFFIDAVITS IN REBUTTAL OF THOSE OF MAYNARD F. STILES, H. K. SHUMATE, HENRY C. FLESHER, AND OTHERS.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

Affidavits in Rebuttal of Those of Maynard F. Stiles, H. K. Shumate, Henry C. Flesher, and Others.

STATE OF WEST VIRGINIA, *Mingo County,* } *To wit:*

Aley Browning, being first duly sworn, on her oath says: "I am fifty-seven years old, and reside on Ben creek, in Mingo county, West Virginia, at the home of my sister, Sarah D. Hatfield, on the lands of which Joseph Hatfield died seized, and have lived at that place with my sister continuously from the year 1870 until the present, except about one year, beginning in October, 1896."

Affiant further says: "I distinctly remember that some time in 1895 Mr. H. K. Shumate came to our house on Ben creek in company with a man he introduced as Judge Stiles, and that said Stiles and my sister, Sarah D. Hatfield, had a

long talk in the parlor and alone. Mr. Shumate was out, about the place somewhere, and was not present at the time of this conversation. I was engaged at house-work and did not hear the conversation between my sister and the said Stiles, but my sister told me what had occurred between her and the said Stiles, either the same evening of the conversation or the next morning. Mr. Shumate and Mr. Stiles staid all night with us.

"I have today heard read the affidavit of my sister, Sarah D. Hatfield, filed in the case of S. D. Hatfield and Nancy C. Rutherford against Henry C. King, pending in the Supreme Court of the United States, and I here state that the conversation between my said sister and Mr. Stiles, as given in her said affidavit, is, in all respects, the same as was detailed to me by her as having occurred between the said Stiles and her in the parlor, as above stated.

"I am told that Mr. Stiles denies that he was present at our house in company with Mr. Shumate at the time of the arrangement referred to in my sister's affidavit above mentioned. In this Mr. Stiles is mistaken, for I distinctly remember that both Mr. Stiles and Mr. Shumate were at our house and remained overnight on the occasion when my sister, Sarah D. Hatfield, told me of the arrangement she and said Stiles had made while in consultation in our parlor, which arrangement is set out in my sister's affidavit aforesaid.

"My sister and I live alone at the Hatfield home, on the head of Ben creek, five miles from the station, Wharncliffe, on the Norfolk and Western railroad.

"ALEY BROWNING."

Taken, sworn to, and subscribed before me this the 14th day of November, 1901.

J. M. HATFIELD,

Notary Public in and for Mingo County, West Virginia.

STATE OF WEST VIRGINIA, } *To wit:*
Mingo County, }

T. H. Graham, being first duly sworn, upon his oath says that during the years 1895 and 1896 I worked for Mrs. Sarah D. Hatfield and lived at her house, known as the "Joseph Hatfield" home, on the head of Ben creek, in Mingo county West Virginia. I remember seeing M. F. Stiles, whom I knew as Judge Stiles, at the house of Mrs. Hatfield during the year 1895, with H. K. Shumate, and on another occasion when Mr. Shumate was not with him. Judge Stiles and Mr. Shumate, on the first occasion referred to, remained overnight at the house of Mrs. Hatfield. On the occasion when said Shumate and Stiles remained overnight at Mrs. Hatfield's, and I think the next morning, Mrs. Hatfield told me of an arrangement she had made with Judge Stiles about her land and the defense of her title in the suit that Henry C. King had brought against her.

I have today heard read the affidavit of Sarah D. Hatfield, made on the 30th day of September, 1901, filed in the case of S. D. Hatfield and Nancy C. Rutherford against Henry C. King, pending in the Supreme Court of the United States, which affidavit in part sets forth the arrangement that Mrs. Hatfield made with Judge Stiles on the occasion of his visit in company with Mr. Shumate to her house, and I here state that Mrs. Hatfield told me of that arrangement on the morning of their visit after they had remained overnight, and that the same as set forth in her affidavit is in all substantial respects the same as she related it to me at her house on the occasion referred to.

T. H. GRAHAM.

Taken, subscribed, and sworn to before me, as witness my hand and seal this 22d day of November, 1901.

[SEAL.] JAS. DAMRON,
Notary Public for Mingo Co., W. Va.

STATE OF WEST VIRGINIA, } *To wit:*
Mingo County. }

Crockett Allison, being first duly sworn, upon his oath says:

"I am 41 years of age, and live on Ben creek, in Mingo county, West Virginia, where I was born and raised. I am a merchant and timberman. I am acquainted with Sarah D. Hatfield and have known her about all my life. I am also acquainted with John A. Sheppard and have known him since 1888. I have seen and read the affidavits of Sarah D. Hatfield and John A. Sheppard in the case of Sarah D. Hatfield and Nancy C. Rutherford against Henry C. King, pending in the Supreme Court of the United States, and I here state that the conversation between said Sheppard and Mrs. Hatfield, as set forth in Sheppard's affidavit aforesaid, is a true statement of what occurred between Mrs. Hatfield and myself and between Mrs. Hatfield and the said Sheppard in my presence, and that the statement in the affidavit of said Sheppard contained is a correct and true statement of all that occurred between Mrs. Hatfield and me and between Mrs. Hatfield and said Sheppard in my presence.

"CROCKETT ALLISON."

Taken, subscribed, and sworn to before me, as witness my hand and seal this 23d day of November, 1901.

[SEAL.] JAS. DAMRON,
Notary Public.